

But this facial contradiction does not stand alone: As shown in Rivertown's October 4, 1993 Motion to Enlarge Issues, Ms. Sample-Day was replaced as full-time news director in early September by Mark Denney; Mr. Denney advised Rivertown's David Brown on September 5 that he had been hired by KKSI, and that Ms. Sample-Day had been discharged by Bruce Linder after KKSI's Operations Manager had criticized her for failing to cover adequately a city election. Rivertown's Motion also showed that on September 23, Mr. Denney represented himself to affiant Michael Crumb as KKSI's full-time news director.

Sample's Opposition to Rivertown's Motion rested solely on Ms. Sample-Day's statement that Mr. Linder had advised her on August 17 or 18 that KKSI was attempting to reduce expenses; that it was phasing out its full-time news department; and that she would be laid off effective August 19. She attached to her statement a hand-written letter from Bruce Linder, dated August 18, stating that "we are phasing out the position of full-time newsperson [sic; her title of News Director apparently had been "phased out" after the hearing] at KISS FM . . . as a cost saving measure." Sample offered no response to Rivertown's claim that Mr. Denney had replaced her as full-time News Director; aside from showing that the city election had occurred one week earlier than the date Brown had recalled Denney mentioning, it did not deny that Ms. Sample-Day had

inadequately covered that election and had a falling-out with the Operations Director over that matter.

The Judge denied Rivertown's Motion in his Order released November 1 (FCC 93M-887), stating that "No weight may be given to the Brown affidavit because his information is based on hearsay," and that the Crumb affidavit "does not undermine, much less contradict, Sample's assertion made in its September 17, 1993 Amendment. Denney may well have taken on other duties in addition to news." (Emphasis added. Ironically, in the following paragraph, the Judge charges that Rivertown's "pleadings abound in speculation.")

In denying Rivertown's Motion, the Judge ruled (§6):

"To sustain a misrepresentation issue, Rivertown must show that Sample-Day knew the statement to be false and had motive to make a false statement. Fox River Broadcasting, Inc., 93 FCC 2d 127 (1983). Rivertown has failed to address this prerequisite."

In fact, Rivertown specifically addressed that "prerequisite" in its Reply to Opposition, at page 4, stating:

"This is a simplistic view of the law. Surely, it is no defense to a misrepresentation charge that the individual responding on behalf of the applicant believed the falsehood supplied to the respondent by a co-principal who knew the information to be false."

Clearly (as Rivertown argued), Bruce Linder was motivated to conceal the true reasons for Ms. Sample-Day's termination, for they stand in dramatic contrast to the encomiums which he lavished upon her in his hearing testimony, and would detract significantly from what he perceives to be Sample's

strong comparative case. While he may have misled Ms. Sample-Day as to his intentions regarding "downsizing" the KKSI staff and "phasing out the full-time news department," he must have been aware that an amendment to Sample's application would be required, and that in such an amendment she would recite the misinformation which he had conveyed to her.¹⁷ In sum, Rivertown's Motion complemented the "facially contradictory facts" contained in Sample's amendment, and raised substantial questions as to the accuracy of the representations contained in that Amendment, requiring enlargement of the issues.

IV. Conclusion

For the foregoing reasons, the Initial Decision must be reversed, and the application of Rivertown granted.

Respectfully submitted,

RIVERTOWN COMMUNICATIONS COMPANY, INC.

By:

A large, stylized handwritten signature in dark ink, appearing to read "Donald E. Ward". The signature is written over a horizontal line.

Donald E. Ward

Law Offices of Donald E. Ward
1201 Pennsylvania Avenue, N.W.
Fourth Floor
Washington, D. C. 20004
(202) 626-6290

Its Attorney

December 10, 1993

¹⁷ Of course, Sample's attorneys are also attorneys for KKSI and Linder, and either knew or should have known of the true KKSI staffing intentions.

1 P R O C E E D I N G S

2 MR. WARD: This is the deposition of
3 Mark McVey. Would you swear the witness, please?

4 Thereupon

5 MARK MCVEY

6 was called as a witness, and after having been
7 duly sworn, was examined and testified as follows:

8 EXAMINATION BY COUNSEL FOR RIVERTOWN COMMUNICATIONS
9 COMPANY, INC.

10 BY MR. WARD:

11 Q. Mr. McVey, my name is Don Ward. I
12 represent the Rivertown Communications Company.
13 You are with two attorneys, or you arrived with
14 two attorneys.

15 MR. WARD: Would each of you like to
16 state for whom you are appearing here?

17 MR. NEELY: John Neely and Jerrold
18 Miller, appearing on behalf of O-Town
19 Communications.

20 MR. WARD: Sample Broadcasting is
21 unrepresented?

22 MR. MILLER: To the extent that there is
23 a commonality of interest, and we believe that
24 there is, we believe that Sample's interests are
25 being represented here; however, our

1 representation today is on behalf of O-Town.

2 MR. WARD: Okay.

3 BY MR. WARD:

4 Q. Mr. McVey, would you give us your home
5 address, please?

6 A. 620 Lake Road, Ottumwa, Iowa.

7 Q. Would you spell it for the reporter?

8 A. O-t-t-u-m-w-a.

9 Q. You are appearing here pursuant to a
10 subpoena, is that correct?

11 A. Yes.

12 Q. And that subpoena asked you to produce
13 for this deposition certain documents, do you
14 recall?

15 A. Yes, it does.

16 Q. Have you produced documents which, in
17 your opinion, fulfill that requirement?

18 A. Those are the only documents.

19 Q. Would you just identify those documents,
20 please, for the record?

21 A. A letter dated July 30th, from Al
22 Engineering, to Mark McVey, with an area-to-locate
23 map attached, 282C3.

24 Q. Could you identify the date and the
25 year, just so the --

Certificate of Service

I, Donald E. Ward, do hereby certify that I have this 10th day of December, 1993, caused to be served by first class United States Mail, postage prepaid, a copy of the foregoing "EXCEPTIONS AND BRIEF" to the following:

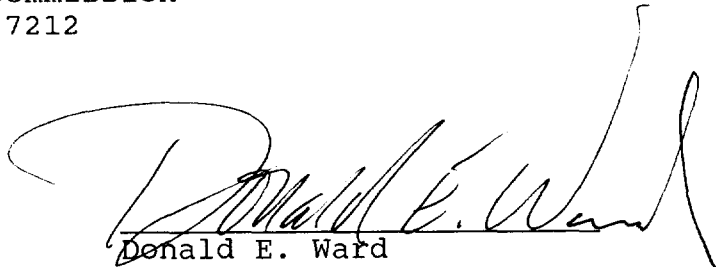
Hon. Joseph A. Marino*
Chairman, Review Board
Federal Communications Commission
2000 L Street N.W.
Washington, D.C. 20554

Hon. Norman B. Blumenthal*
Review Board
Federal Communications Commission
2000 L Street N.W.
Washington, D.C. 20554

Hon. Marjorie R. Greene*
Review Board
Federal Communications Commission
2000 L Street N.W.
Washington, D.C. 20554

Jerrold D. Miller, Esq.
Miller & Miller
1990 M Street N.W., Suite 760
Washington, D.C. 20036

Norman Goldstein, Esq.
Hearing Branch, Enforcement Division
Mass Media Bureau
Federal Communications Commission
2025 M Street N.W., Rm. 7212
Washington, D. C. 20554



Donald E. Ward

* By Hand